FILED
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WM. R. STANSBU
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No. 322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
Respondents.

Motion to dismiss

BRIEF OF RESPONDENTS.

W. P. BYNUM,
R. C. STRUDWICK,
Counsel for Respondents.

POSTPONED TO MERITS
JAN 12 1925

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1924

MOTION AND NOTICE.

North Carolina Railroad Company, Petitioner,

vs.

C. D. Story, Sheriff of Alamance County, N. C., and P. M. King, Administrator, Respondents.

To S. R. Prince, H. O. B. Cooper, and W. M. Hendren, Attorneys of Record for Petitioners:

Please take notice that respondents will, on Monday the 20th day of October, 1924, present to the above named Court at its Court room in Washington, their motion to dismiss the writ of certiorari heretofore granted in this case. A copy of said motion and of the brief in support thereof is herewith delivered to you this.....day of September, 1924.

W. P. Bynum,
R. C. Strudwick,
Counsel for Respondents.

Received copy of the above notice, also copy of said motion and brief, September ....., 1924.

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.....

.....

Counsel for Petitioner.

MOTION TO DISMISS WRIT OF CERTIORARI

Now come the respondents and move the Court for an order dismissing the writ of certiorari herein:

First. Because the judgment of the Supreme Court of North Carolina thereby sought to be reviewed is not a final judgment.

This motion is based upon the transcript of the record accompanying the petition for certiorari and upon the records and files of this Court.

This ..... September, 1924.

W. P. Bynum,
R. C. Strudwick,
Counsel for Respondents.

BRIEF OF RESPONDENTS IN SUPPORT OF MOTION

The record shows that petitioner began this action on May 5, 1923, in the Superior Court of Guilford County, North Carolina. It alleged in its complaint certain facts, which it claimed, entitled it to a permanent injunction forbidding the respondents to sell certain of its property under an execution which had been issued to Story, Sheriff, upon a judgment obtained by King, administrator, against it. The prayer was for a permanent injunction. Respondents answered, denying certain allegations of the complaint, and, for a further defense, they pleaded that all matters set up in the complaint were *res adjudicata* and could not be again litigated in the present action.

On the 5th day of May, 1923 (the day the complaint was filed), petitioner obtained from a judge of said Superior Court (Harding) an order that respondents show cause, before Shaw, another judge of the Superior Court, at Winston-Salem, on May 22, 1923, why a temporary injunction should not be issued, and in the meantime, restraining respondents from taking any steps with a view to the sale of petitioner's property under said execution, until the further order of the Court.

The matter was heard before Judge Shaw at the time and place appointed. Whereupon he made an order adjudging

"that the motion of plaintiff (petitioner) to continue and make permanent the temporary restraining order issued by Hon. W. F. Harding be and it is hereby denied." Record, p. 16.

Petitioner appealed from this order to the Supreme Court.

That Court, on February 20, 1924, upon consideration of said appeal, affirmed the order of Judge Shaw. Petitioner thereupon applied for and obtained from this Court a writ of certiorari to review that judgment, or order. The judgment in the case of King, administrator, vs. the North Carolina R. R. Co. (184 N. C., 442) is referred to in the petition, but its relevancy does not appear. The writ of certiorari is not sought to review that judgment; indeed, it could not be, as it was rendered November 29, 1922, more than a year before application for the present writ was made.

The instant case is still pending in the Superior Court of Guilford County, the issues raised by the answer of respondents have never been tried or passed upon, and no final judgment has ever been rendered therein by that court.

This appears from an inspection of the record.

POINT I

THE JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA, SOUGHT TO BE REVIEWED BY CERTIORARI, IS NOT A FINAL JUDGMENT.

Petitioner's action was to obtain a final decree, permanently enjoining respondents from proceeding to enforce the execution.

It made a motion for a temporary or preliminary injunction to restrain action by respondents under said execution until the case could be heard upon the merits and finally determined. Until its motion could be considered it obtained, *ex parte,* a restraining order. Consolidated Statutes N. C., secs. 843, 847, 848, 850. Any order made by the judge in passing on such a motion, either granting or denying it, is in its nature interlocutory. It has no element of finality.

1 High on Injunctions (3d Ed.), secs. 3 and 4. A court of equity, in granting (or refusing) temporary relief, in no manner anticipates the final determination of the questions of right involved. High (*ut supra*), sec. 5.

The order appealed from being interlocutory, it cannot with reason be contended that the order or judgment of the Supreme Court, which affirmed it, was other than interlocutory. *Harriman v. Northern Securities Co.*, 197 U. S., 244, was a suit to obtain a permanent injunction, just as this is. The U. S. Circuit Court for the district of New York made an order granting to plaintiff a temporary or preliminary injunction forbidding it to make a ratable distribution of its corporate assets. The Circuit Court of Appeals, by its judgment, reversed this order of the Circuit Court, thereby dissolving the preliminary injunction. This judgment was the same, in legal effect, as the one now under consideration. Petitioner Harriman applied for and obtained from this Court a writ of certiorari to review this judgment.

This Court treated it as a matter beyond dispute, that the judgment of the Circuit Court of Appeals was not a final one. It retained jurisdiction and passed upon the merits of the case, however, because it was governed by the act of March, 3, 1891, under which finality of the judgment sought to be renewed was not necessary. *Forsyth v. Hammond*, 166 U. S., 506, 513; but it is otherwise under the act of September 6, 1916, which governs the instant case, where a certiorari is sought to review a judgment of the Supreme Court of a State.

The only effect of the judgment herein was to remand the case to the Superior Court for further proceedings.

An answer had been filed in the case; the issues raised hereby have never been passed upon and no final disposition of the case has ever been made by that Court. It was and is entirely competent for the Superior Court to allow the pleading to be amended, thus making a new and different case.

If it be said that any final judgment rendered by the Supreme

Court would necessarily be governed by the judgment and decision of the Supreme Court, this is no answer to respondent's motion.

In *Great West Tel. Co. v. Burnham,* 162 U. S., 341, 345, it is said that the final judgment of the trial Court of the State may have been the necessary result of the previous decision of the State Supreme Court of the questions presented for its determination, but it was none the less, on that account, a judgment of the trial Court. As such, it was, when rendered, open to review by the State Supreme Court upon a new appeal, and for that reason was not the final judgment of the highest Court of the State in which a decision of the cause could be had.

Upon another appeal from the final judgment which may hereafter be rendered by the trial Court in this case, the Supreme Court of North Carolina has the power to ignore, modify or reverse the present decision. It might do so. There is no statute of the State which forbids it.

Messenger v. Anderson, 225 U. S., 436, 444.

In this case it is said: "In the absence of statute, the phrase 'law of the case' as applied to the effect of previous orders on the latter action of the Court rendering them, merely expresses the practice of the Court generally, to refuse to reopen what has been decided, not to limit the power."

Many decisions of this Court sustain the position that the judgment now sought to be reviewed by the certiorari is not a final one. A few of them are cited.

In *Life Ins. Co. v. Adams,* 9 Pet., 573, it is said: "Though the merits of the case may have been substantially decided; while anything, though formal, remains to be done, the Supreme Court cannot pass upon the subject."

In *McCombs v. Knox County,* 91 U. S., 1, it is said: "The Supreme Court so far from putting an end to the litigation purposely left it open. The law of the case upon the pleadings as they stood was settled, but ample power was left in the Common Pleas to make a new case by amendment." "Where

something more than the mere ministerial execution of the decree is left to be done, the decree is interlocutory and not final, even though it settles the equities of the bill."

Dodge v. Twell, 135 U. S., 232, 235.

"The decree to be final must terminate the litigation upon the merits of the case; so, if there be an affirmance here, the Court below would have nothing to do but to execute the judgment or decree it had already rendered."

Bostwick v. Brinkerhoff, 106 U. S., 3.

The application of this test would seem to be conclusive in favor of this motion. The only decree or judgment which the Supreme Court of North Carolina has rendered in this case is one, which declares that petitioner was not entitled to a temporary or preliminary injunction. Upon an affirmance of that judgment here, no execution could issue; many things would be left to be done, before that stage was reached; the case would be still open for trial upon the issues raised by the pleadings as now filed, or as hereafter amended, and for the final judgment of the trial Court, after these matters had been disposed of.

POINT II

THE JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA NOT BEING FINAL, THE WRIT OF CERTIORARI ISSUED TO REVIEW IT SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The certiorari in this case is issued by virtue of the power conferred on this Court by the act of September 6, 1916. By the express terms of that act, this writ can issue to review only a final judgment of the highest Court of the State.

In *Bruce, Admr., v. Tobin*, 245 U. S., 7, this Court says: "The act in question, although it deprived of the right of review by writ of error which had hitherto obtained, in certain cases, and substituted as to such cases, the right of petitioning

for review by certiorari, subjected this last right to the same limitations as to the finality of the judgment of the State Court sought to be reviewed, which had prevailed from the beginning under section 709, R. S. Finality, therefore continues to be an essential for the purpose of the remedy by certiorari conferred by the act of 1916."

Answering the contention that the judgment ought to be treated as final, because it in effect determined the law of the case and the general principles by which the rights of the parties were to be measured, this Court said further: "But that contention is not open, as it was settled under section 709, R. S. (sec. 237, Judicial Code), that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered—a principle which excluded all conception of finality for the purpose of review, in a judgment like that below rendered. The reënactment of the requirement of finality in the act of 1916 was, in the nature of things, an adoption of the construction on the subject which had prevailed for so long a time."

Respectfully submitted,

W. P. Bynum,
R. C. Strudwick,
Counsel for Respondents.

Mitchell Printing Company, Briefs and Records, Raleigh

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 322.

NORTH CAROLINA RAILROAD COMPANY, PETITIONER,

vs.

C. D. STORY, SHERIFF OF ALAMANCE COUNTY, NORTH CAROLINA, AND P. M. KING, ADMINISTRATOR, ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Additional Brief on Behalf of the Respondents, P. M. King, Administrator, Etc., and Others, in Support of the Motion to Dismiss the Writ of Certiorari Granted, by the Supreme Court of the United States, April 7, 1924.

The motion of the respondents to dismiss the Writ of Certiorari should be granted for the *following reasons*, in addition to those heretofore stated in (respondents') printed brief in support of the motion to dismiss.

The printed motion to dismiss, heretofore filed (September, 1924) is as follows:

> "Now come the respondents and move the court for an order dismissing the writ of certiorari herein:
>
> "First. Because the judgment of the Supreme Court of North Carolina thereby sought to be reviewed is not a *final* judgment."

the lower (Superior) court—to the Supreme Court of the State of North Carolina, under a recent and special statute of the State of North Carolina (Chapter 58, Laws of 1921), in language as follows:

> "From so much of the judgment as refuses to continue the *restraining* order to the *hearing*, and also make the same permanent, plaintiff excepts and *appeals*, etc." (Rec., p. 13.)

The foregoing language, "From so much of the judgment as refuses to continue the *restraining* order to the *hearing*," is the language of the appellant (the N. C. Railroad Co., appellant below, and the petitioner for writ of certiorari in this U. S. Supreme Court), and it would seem is an absolute estoppel upon it to now claim that the order of the lower (Superior) court was a final order or final decree. The Supreme Court of North Carolina, upon hearing the case on appeal, simply affirmed the order of the lower (Superior) court, and did not enlarge on it in any way. Hence, neither the order of the lower court (Superior), nor the order of the other lower court (Supreme Court of North Carolina) was a final order or *decree*, and was not meant to be so held or construed by either of the two lower courts. There were issues of fact raised by the pleadings which would require a final hearing of the case before a final decree, final judgment or final order could be passed by the court.

Issues of Facts Involved Not Proven.

(*b*) This contention—that the order is not a *final* order or final *decree*—is further borne out by the fact that the answer of the respondents to the railroad's plaintiff's) bill in equity for an injunction, which answer denies the truth of very material allegations of the

said bill in equity, raises an issue or issues of fact, in the following language (Rec., p. 9):

> "3. Answering paragraph four, the allegations contained therein are *denied* except that the plaintiff, P. M. King, Administrator, the plaintiff in action No. 8101, has caused an execution to be issued on the judgment in the said action pursuant to an order of Judge A. M. Stack, made in the said cause at the March Term, 1923, of Guilford Superior Court, a copy of which said order is hereto attached (fol. 13) as Exhibit B, and asked to be taken as part of this answer and delivered to C. D. Story, Sheriff of Alamance County, North Carolina, an execution pursuant to the said order; that the said Sheriff has levied said execution on certain real property of the plaintiff, the title and possession whereof are in the plaintiff; that the said property so levied upon is not used by the plaintiff or its lessees for transportation purposes; that the plaintiff is not now and has not for many years been engaged in the transportation business or been a carrier of freight and passengers for hire, having leased all its property, not including the property levied upon, to the Southern Railway Company, a foreign corporation."
>
> "4. The allegations of paragraphs five and six of the complaint are denied."

It is apparent from the foregoing, that the case at bar is in no position, upon its record, to have the Supreme Court of the United States finally adjudicate the right between the parties. As was said in the case of the Southern Railway *vs.* Watts, 260 U. S., 319; at the end of the opinion of the court in that case:

> "The state of the record is not such as to justify us in reversing on this ground the decree denying an interlocutory injunction, as to the Atlantic and Yadkin."

Case not Set Down for Hearing on Bill and Answer.

(*c*) There has been no agreement between the parties to hear this case on bill and answer, and it was not so set down for hearing and was not so heard by the court, as is apparent from the record.

No Power or Jurisdiction in the Particular Judge in the Equity Suit to Pass a Final Order at That Time.

(*d*) It appears from the record that this (equity) case was commenced in the Superior Court of Guilford County, North Carolina, on May 5, 1923, *and is still pending there.* Judge Harding, presiding in that court, upon the ex parte motion of the petitioner on May 5, 1923 (under authority of consolidated statutes of North Carolina, Sections 843-847, 848, 849), issued a *temporary* restraining order against the sale of certain of petitioner's property which had been levied upon under the execution in the case of King, Admr., *vs.* North Carolina Railroad, 184 N. C., 442. Judgment in this case was rendered the 29th of November, 1922. Judge Harding, in the present Equity suit of the railroad, made his order returnable on May 22, 1923, before Shaw, Judge of the Superior Court, at the Winston-Salem, which is in *another* country, to wit, Forsyth County. Any geography will show this. And it would seem, therefore, to be a fact of which the court would take judicial notice. The law of North Carolina as declared by the Supreme Court of that state is as follows: "It is well settled by our decisions that no order affecting the substantial rights of the parties can be rendered *outside* of the county wherein such action is pending, except in those cases especially provided by statute or by consent of the parties." (Cahoon *vs.* Brinkley, 176 N. C., 7; Bynum *vs.* Powe, 97 N. C., 378; McNeill *vs.* Hodges, 99 N. C., 248;

Bank *vs.* Pomeroy, 147 N. C., 293; Cox *vs.* Barden, 176 N. C., 376).

The provisions of the consolidated statutes herein referred to do authorize *interlocutory* orders in injunction cases to be made by a judge of the Superior Court in a county other than that in which the action was brought, and in which it is pending, but no authority is anywhere allowed to render a *final* judgment outside of such county. Judge Shaw, therefore, in Forsyth County had no power to render a *final* judgment in this case, and it appears from the record that he did not do so, nor attempt to do so, but he did have power, under the statutes, to pass upon an application for *an injunction pendente lite*, which he did, refusing the application.

Case on the Record so far Made.

While it is impossible, under the law, it is respectfully submitted, for this court (Supreme Court of the United States) to consider this case, at its present stage, strictly upon the merits; yet if the motion of respondents, to dismiss the writ of certiorari, be overruled, and this court decides to consider the case on its merits, based upon the record so far made, these respondents (King, admr., et al.) rely upon the two very learned opinions of Hoke, Judge, speaking for all of the judges of the Supreme Court of the State of North Carolina—first at pages 14, 15, 16 and 17 of the printed record (in the case of N. C. R. R. Co. *vs.* C. D. Story, Sheriff, etc., No. 385), and second, upon the opinion of the same judge, Hoke, again speaking for all of the judges of the Supreme Court of North Carolina, at pages 30, 31, 32 and 35, and 36, of the printed record (in the case of P. M. King, Administrator, etc., *vs.* N. C. R. Co., 390). Both of these opinions of the Supreme Court of North Carolina, and the decisions of that

court, based upon the record so far made, were in favor of the respondents (King, Administrator, etc.).

No brief has been filed by the petitioner, appellant, (for consideration of this court on final hearing) on the record so far completed.

This brief of the respondents, is filed in support of the motion to dismiss the writ of certiorari, and is in addition to the briefs of the respondents filed March 13, 1924, and September 25, 1924.

In conclusion, it is respectfully suggested that as set forth above, the record of this case is not complete, enough or in a state for this court to pass upon the facts and the law, and, therefore, the writ of certiorari should be dismissed upon the motion of respondents heretofore made and filed, and which motion is now before this court.

The respondents fully recognize that this court in first passing upon the question of whether or not a writ of certiorari should issue, it is impossible for this court to give the petition for the writ of certiorari such mature and detailed consideration, as to the law and facts, as is possible at the final hearing of the case. This court, therefore, postponed the respondents' motion to dismiss the Writ of Certiorari to this final hearing and the respondents now respectfully submit that the writ of certiorari should be dismissed.

Respectfully submitted,

ROBERT C. STRUDWICK,
WM. P. BYNUM,
CHAPIN BROWN,
Attorneys for Respondents.